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Foreword

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TWENTY-NINTH ANNUAL TENTH CIRCUIT SURVEY: SEPTEMBER 2001–AUGUST 2002

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INTRODUCTION

The *Denver University Law Review* asked me to provide an overview of the Tenth Circuit's work during the survey period, September 2001 through August 2002. The Tenth Circuit's case docket is as diverse as the twelve circuit judges and seven senior judges who handle our workload, and reflects the rich geographic and cultural assets of the circuit. We hear appeals from eight district courts throughout our six-state region,[1] in addition to cases that originated in the United States Bankruptcy Court, the United States Tax Court, and various federal administrative agencies.

During the survey period, litigants initiated 2,616 appeals in the Tenth Circuit.[2] Of this total, nearly one-third involved *habeas corpus* petitions or civil rights suits brought by state and federal prisoners. The following table provides a percentage breakdown of all Tenth Circuit cases by type:[3]

Type of Case	Percentage of Total
Criminal	17.7
United States Civil (Civil suits in which the U.S. is a party)	8.7

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1. The states within the jurisdiction of the United States Court of Appeals for the Tenth Circuit are Wyoming, Utah, Colorado, Oklahoma, New Mexico, and Kansas.

2. *See* E-mail from Regi Aichlmayr, UNIX/Web Systems Specialist, United States Court of Appeals for the Tenth Circuit, to Greg Deis, Judicial Clerk, United States Court of Appeals for the Tenth Circuit (Jan. 23, 2003) (copy on file with the *Denver University Law Review*).

3. *Id.*

Private Civil	27.9
Prisoner Habeas Corpus Petitions (other than § 2254 and § 2255 petitions)	15.4
Prisoner Habeas Corpus Petitions Under 28 U.S.C. §§ 2254 and 2255	5.4
Prisoner Civil Rights Suits (state and federal prisoners)	11.5
Prisoner Suits (other)	0.5
Bankruptcy	0.5
Tax	0.9
Administrative Appeals	2.8
Original Proceedings	8.6

During 2001,[4] the Tenth Circuit decided 2,792 appeals.[5] Of this total, 34% were decided after oral argument, while the remaining cases were disposed of without oral argument.[6] These percentages closely track the national average for the circuit courts throughout the United States.[7]

4. Numbers for the survey period were unavailable for this article.

5. UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 2001 ANNUAL REPORT (2001) (on file with author).

6. *Id.*

7. In 2001, the national averages for cases decided with oral argument and without oral argument were 32% and 67%, respectively. *Id.*

RECENT TENTH CIRCUIT DECISIONS

A. Overview

The Tenth Circuit cases highlighted in this survey cover a broad spectrum of issues, ranging from *qui tam* actions filed under the False Claims Act[8] to First Amendment freedoms in the public-school setting.[9] In the following section, I briefly discuss these cases, while the case comments in this issue provide a more thorough analysis.

In reviewing these decisions, one overarching theme emerges: the federal courts function within a governmental construct based on several "first principles,"[10] structural elements embodied in the Constitution and undergirding our system of government. These first principles permeate much of the Tenth Circuit's work, as illustrated by the cases that are reviewed in this issue.

The first among these fundamental principles is federalism. Federal courts are vested with the vital role of demarcating the proper spheres of authority assigned to the dual sovereigns in our federalist system. Federalism ideals emphasize the importance of placing many aspects of government closer to the people, increasing political accountability, while serving to enfranchise the citizenry, and thereby promoting individual liberty. As the Supreme Court has stated, "[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[11]

Second, within the federal government, the judiciary is but one of three co-equal branches of government, and the federal courts must observe the boundaries set forth in the first three articles of the Constitution, while delineating these boundaries in specific cases. This diffusion of power functions to promote individual liberty, reinforcing the values underlying federalism principles. As James Madison noted in Federalist No. 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the peo-

8. *See* United States *ex rel.* Holmes v. Consumer Ins. Group, 279 F.3d 1245 (10th Cir. 2002).
9. *See* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002).
10. Deanell Reece Tacha, *The Federal Courts in the 21st Century*, 2 CHAP. L. REV. 7, 9 (1999).
11. New York v. United States, 505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

> ple. The different governments will control each other, at the same time that each will be controlled by itself.[12]

Similarly, within the federal court system, we as appellate courts must adhere to the limited role bestowed upon us, respecting the primary role of the federal district courts in certain regards.

Finally, and most importantly, federal courts exist to protect individual sovereignty, the ideal embodied in the preamble to our Constitution, which reminds us: "We the People of the United States . . . ordain[ed] and establish[ed] this Constitution for the United States of America."[13] The concept of individual sovereignty is primary among these fundamental principles, as it is the purpose for which the other two principles function.

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of [individual] liberty.[14]

Thus, in the end, all three first principles converge into one overarching tenet: the primacy of individual liberty. In order to accord proper protection to this basic precept that underlies our entire system of government, it is important to recognize the many contexts in which these first principles manifest themselves. The cases discussed in this issue illustrate this point, highlighting the essential functions performed by the Tenth Circuit and other federal courts.

B. Our Federalist System

I begin with federalism. Three cases touch on this first principle, *Fleming v. Jefferson County School District R-1*,[15] a First Amendment case, and two *habeas corpus* cases, *Herrera v. Lemaster*[16] and *Johnson v. McKune*.[17]

In *Fleming*, we held that school-sponsored speech need not be viewpoint neutral[18] under the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*,[19] so long as the school's actions further

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12. THE FEDERALIST NO. 51, at 161 (James Madison) (Roy P. Fairfield ed., 1966).
13. U.S. CONST. pmbl.
14. Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991).
15. 298 F.3d 918 (10th Cir. 2002).
16. 301 F.3d 1192 (10th Cir. 2002).
17. 288 F.3d 1187 (10th Cir. 2002).
18. *Fleming*, 298 F.3d at 926.
19. 484 U.S. 260 (1988).

legitimate pedagogical interests.[20] In reaching this holding, the court afforded substantial deference to the local educators' stated educational concerns.[21] We stressed that such deference and restraint was appropriate, in light of the fact that "[b]y and large, public education in our Nation is committed to the control of state and local authorities."[22]

Federalism and comity principles were also at the forefront in two *habeas corpus* cases before the Tenth Circuit. In *Herrera*, we held that a federal court on *habeas corpus* review must apply harmless-error analysis,[23] even when a state court decision is contrary to or involves an unreasonable application of controlling Supreme Court authority.[24] This holding furthers the concerns articulated by the Supreme Court in *Brecht v. Abrahamson*:[25] (1) the State's primacy in defining and enforcing criminal laws; (2) the State's interest in the finality of criminal convictions; and (3) respect for state court sovereignty, specifically, the state court's "initial responsibility for vindicating constitutional rights [in state criminal trials]."[26]

The court echoed these themes in *Johnson*.[27] In considering the retroactivity of the constitutional rule set forth in *Sandstrom v. Montana*,[28] we stressed that "the intrusiveness and the inordinate and overwhelming burden that widespread retroactivity would have on the states' judicial resources," and the understandable frustration of state courts "when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."[29] Based on these considerations, we held that the *Sandstrom* rule did not apply retroactively to cases on collateral review.[30]

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20. *Fleming*, 298 F.3d at 934.

21. *Id.* at 925.

22. *Id.* at 925 n.5 (internal quotation marks omitted) (quoting West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1363 (10th Cir. 2000)).

23. *Herrera*, 301 F.3d at 1200. We also reinforced the Supreme Court's holding in *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), that a federal court on *habeas corpus* review must apply the more relaxed harmless-error standard under *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), as compared to the more rigorous standard applicable on direct review under *Chapman v. California*, 386 U.S. 18, 24 (1967). *Herrera*, 301 F.3d at 1200.

24. *Herrera*, 301 F.3d at 1200. Although this was clearly the state of the law prior to 1996, the defendant in *Herrera* argued that the Antiterrorism and Effective Death Penalty Act displaced prior law and made harmless-error analysis inappropriate where the state court decision was contrary to clearly established law. *Id.* at 1194-95.

25. 507 U.S. 619 (1993).

26. *Brecht*, 507 U.S. at 635.

27. *Johnson*, 288 F.3d at 1195.

28. 442 U.S. 510, 524 (1979) (holding that a jury instruction—that the law presumes an individual intends the ordinary consequences of her actions—which a jury may have interpreted as a conclusive presumption or as shifting the burden of persuasion, was unconstitutional under the Fourteenth Amendment).

29. *Johnson*, 288 F.3d at 1195 (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)).

30. *Id.* at 1200.

C. Separation of Powers Principles

1. The Executive, Legislative, and Judicial Branches

An equally important constitutional principle is the notion of separation of powers, perhaps most often implicated in considering the interplay between the judicial and legislative branches of government. Two of the cases analyzed in this issue touch on separation of powers principles: *United States ex rel. Holmes v. Consumer Insurance Group*[31] and *Hall v. Unum Life Insurance Co. of America.*[32]

In *Holmes*, the en banc court considered whether a federal employee, who was participating in an ongoing governmental investigation of fraud pursuant to her job duties, was a proper *qui tam* plaintiff under the False Claims Act.[33] The majority concluded in the affirmative, invoking the "plain meaning" rule of statutory construction.[34] As numerous commentators have observed, this principle of statutory construction furthers separation of powers values by "constraining" a court's ability to go beyond the statute's plain meaning.[35] The dissent, on the other hand, concluded that the government employee in question was not a proper *qui tam* plaintiff.[36] The dissent reached this conclusion based in part on the principle of statutory construction under which federal courts must strictly construe jurisdictional statutes.[37] This cannon of statutory construction similarly serves to maintain the balance of power between the federal courts and Congress set forth in Article III, Section 2 of the Constitution.[38]

In *Hall*, we considered the scope of our evidentiary review in an Employee Retirement Income Security Act ("ERISA") case.[39] The question presented was the circumstances, if any, in which a district court may supplement the administrative record in considering an employee-beneficiary's challenge to a plan-administrator's benefits determination.[40] After acknowledging Congress' agency-like setup in the context

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31. 318 F.3d 1199 (10th Cir. 2003) (en banc).
32. 300 F.3d 1197 (10th Cir. 2002).
33. *Holmes*, 318 F.3d at 1200-02.
34. *Id.* at 1209.
35. *See, e.g.*, Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1, 73 & n.303 (1993) (citing cases that make the argument). The dissent in *Holmes* also relied on the plain meaning rule. *See Holmes*, 318 F.3d at 1209 (Tacha, C.J., dissenting) ("To determine a statute's plain meaning, '[we] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" (quoting Chickasaw Nation v. United States, 208 F.3d 871, 878 (10th Cir. 2000) (internal quotation marks omitted))).
36. *Holmes*, 318 F.3d at 1221 (Tacha, C.J., dissenting).
37. *Id.* at 1216 (Tacha, C.J., dissenting) ("[W]e must strictly construe statutes conferring jurisdiction, resolving *any* doubts against jurisdiction.").
38. U.S. CONST. art. III, § 2 (defining the authority and limits to the authority of the federal courts).
39. *See* 29 U.S.C. §§ 1001–1461 (2000). We considered this question in the context of *de novo* review. *Hall*, 300 F.3d at 1201.
40. *Hall*, 300 F.3d at 1200.

of employee-benefits decisions under ERISA, we strictly limited the circumstances in which a district court might supplement the administrative record.[41] That holding could be viewed as an effort to strike the appropriate balance between two competing concerns: avoiding a system in which federal district courts function as substitute plan administrators and protecting employees' substantive and procedural rights.

2. The Proper Role of the Appellate Court in the Federal Court System

Although the concept of separation of powers is primarily identified with the three branches of our federal government, similar principles operate in defining the proper role of the appellate court in reviewing district court decisions. For example, appellate courts accord substantial deference to the district court's role as fact finder, granting the district court broad discretion in performing this role. The decision in *Hall* reinforced this principle. Similarly, the plain-error doctrine at issue in *United States v. Lujan*[42] and *United States v. Avery*,[43] both *Apprendi*[44] cases, serves to minimize instances in which appellate courts disrupt the final judgments of district courts.[45]

D. Individual Sovereignty

The final first principle that I will discuss is the concept of individual sovereignty, the notion that government exists first and foremost not as an end in itself, but as the protector of individual liberty. The cases in this survey touch on numerous individual rights, including: First Amendment freedoms;[46] Fourth Amendment protections against unreasonable searches and seizures;[47] protection against racial discrimination under the Equal Protection Clause of the Fourteenth Amendment;[48] rights under the Due Process Clause of the Fourteenth Amendment;[49] and the right of incarcerated persons to seek federal *habeas corpus* relief.[50] As

41. *Id.* at 1202. Specifically, we held that although review of an ERISA benefits decision should generally be limited to the administrative record, the district court may, in its discretion, supplement that record when circumstances clearly establish that additional evidence is necessary to adequately conduct its *de novo* review. *Id.*

42. 268 F.3d 965, 967 (10th Cir. 2001) (affirming district court's sentencing decision).

43. 295 F.3d 1158, 1182 (10th Cir. 2002) (affirming district court's sentencing decision).

44. Apprendi v. New Jersey, 530 U.S. 466 (2000) (establishing constitutional requirements for applying sentencing guidelines that increase the penalty for a crime beyond the statutory maximum).

45. Although the plain-error doctrine primarily seeks to promote the adversary system and further judicial efficiency, it also serves to protect the finality of district court judgments.

46. *Fleming*, 298 F.3d at 922.

47. *Avery*, 295 F.3d at 1164; *Herrera*, 301 F.3d at 1194.

48. Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002). The action in *Townsend* was based on the Civil Rights Act of 1964, which embodies the Fourteenth Amendment. *See Townsend*, 294 F.3d at 1236.

49. *Johnson*, 288 F.3d at 1192; *Townsend*, 294 F.3d at 1233.

50. *Johnson*, 288 F.3d at 1191; *Herrera*, 301 F.3d at 1193.

the courts of last resort in most cases, the federal courts of appeal are vested with the weighty responsibility of defining the contours of these numerous individual procedural and substantive rights.

In performing this function, it is imperative that federal courts recognize the manner in which "procedural" rights function to protect "substantive" rights. Our holding in *Townsend v. Lumbermens Mutual Casualty Co.*[51] aptly illustrates this point. In *Townsend*, an employment discrimination case, we held that in certain contexts a trial court must instruct a jury that they may infer a discriminatory motive if they disbelieve the employer's proffered explanation.[52] We recognized the substantial danger of jury confusion, noting that it would be "unreasonable . . . to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefit of such arguments."[53] Securing this procedural right heightened the protection afforded the substantive right to equal treatment under the law, embodied in the Equal Protection Clause of the Fourteenth Amendment[54] and the Civil Rights Act of 1964.[55]

CONCLUSION

The first principles, which animate our work, stand as powerful reminders of the great legacy of a government "of the people, by the people, and for the people" [56] that we have inherited. In these troubled times in our country, it is essential that we all—judges, lawyers, and all citizens—be vigilant in protecting and preserving these first principles and the other cornerstones of this republic. The system of checks and balances, separation of powers, and protection of individual sovereignty stand at the heart of our definition of freedom as it has been experienced in the United States. The judges and staff of the Tenth Circuit are privileged and humbled by the opportunity to serve this nation representing the Third Branch of government in the six states within the borders of the circuit. We particularly appreciate the assistance and support we receive from the law schools in the circuit. We are indebted to the *Denver University Law Review* for its annual review of our case law. We are hopeful that students and the public alike will not only read the opinions, but will also, from time to time, visit the historic courtrooms in the Byron White

51. *Townsend*, 294 F.3d at 1241.

52. *Id.* We did not hold that such an instruction was always required. Rather, such an instruction is required where "a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'" *Id.*

53. *Id.* at 1241 n.5.

54. *See* U.S. CONST. amend. XIV, § 1.

55. *See* 42 U.S.C. §§ 2000e to e-17 (2000).

56. President Abraham Lincoln, Address at Gettysburg, Pa. (Nov. 19, 1863), *in* MORTIMER J. ADLER & WILLIAM GORMAN, THE AMERICAN TESTAMENT (1975).

United States Courthouse[57] to be reminded of the lasting legacy of the rule of law and the more than almost seventy-five years of development of that law in this circuit.

57. The Byron White United States Courthouse is located at 1823 Stout Street, Denver, Colorado.